## IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)
Plaintiff,	) )
vs.	No. 77-CR-37-03-6
DANNY ALEX MACIAS,	
Defendant.	nec 31 1800

### ORDER NUNC PRO TUNC

Sua sponte it is ordered nunc pro tunc that the Order of December 30, 1980 shall be amended, by adding thereto the following:

"The special parole term for life, to commence at the expiration of the sentence imposed herein on Counts 4 and 6, remains unchanged." This was a valid portion of petitioner's original sentence and was inadvertently omitted.

It is so Ordered this 31st day of December, 1980.

H. DALE COOK

Chief Judge, U. S. District Court

## IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
VS.	)	No. 77-CR-37-C
DANNY ALEX MACIAS,	į	فسيها المناه مستا
Defendant.	)	DEC 30 1930 K
		Jock C. Silver, Cloub

ORDER

Jock C. Silver, Clock U. S. Pistrict court

Now before the Court is the petition of defendant Danny Alex Macias to correct his sentence imposed on June 10, 1977, pursuant to Rule 35 of the Federal Rules of Criminal Procedure.

On May 13, 1977, petitioner was found guilty by a jury on charges of conspiracy to distribute narcotics and aiding in the distribution of narcotics. On June 10, 1977, in U. S. District Court for the Northern District of Oklahoma he was sentenced to three terms of 25 years, on Counts 1, 4, and 6, all to run concurrently, but consecutively to sentences previously imposed by the Central District and Southern District of California in 1974. He was also fined \$25,000. Petitioner was sentenced pursuant to 21 U.S.C. §841(b)(1)(A). This statute provides for a maximum penalty of not more than 15 years, a fine of not more than \$25,000, or both. However, if the individual to be sentenced has a prior conviction under this section or any felony relating to narcotic drugs, he is subject to a maximum sentence of 30 years imprisonment (followed by a mandatory special parole term of six years) and a \$50,000 fine. In order to impose the enhanced sentence, the Court must comply with 21 U.S.C. §851. Section 851 provides that:

(a)(1) No person who stands convicted of an offense under this part shall be sentenced

to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the Court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied on . . .

It is alleged by petitioner that no information was ever filed by the United States attorney with the Court or served upon defendant or his counsel prior to trial as required by Section 851(a)(l). Further no mention of any information was made during the sentencing of petitioner. Petitioner contends that failure to comply with Section 851 mandates that petitioner's enhanced concurrent sentences be reduced to the statutory maximum as set out in 21 U.S.C. \$851(b)(l)(A) of 15 years on each count, to run concurrently.

The plaintiff agrees that the Motion to Correct Illegal Sentence has merit, and suggests that the illegal sentence be set aside and that the defendant be re-sentenced on all counts of the indictment on which he was convicted.

It has been held that the appropriate remedy to correct an illegal sentence is re-sentencing in which the valid portions of the original sentence are retained and the excessive portions are eliminated. U.S.A. v. Best, 571 F.2d 484 (9th Cir. 1978); Kennedy v. U.S.A., 330 F.2d 26 (9th Cir. 1964); Bozza v. U.S., 330 U.S. 160, 67 S.Ct. 645, 91 L.Ed. 818 (1947). Rule 35 of the F.R.Cr.P. provides that the Court may correct an illegal sentence at any time. both Kennedy v. U.S.A., supra, and U.S.A. v. Best, supra, the sentences were void only as to the excessive portions and only those portions were modified. See also Ex parte Lange, 85 U.S. 163, 21 L.Ed. 872 (1874); <u>In re Bonner</u>, 151 U.S. 242, 258, 14 S.Ct. 323, 38 L.Ed. 149 (1893); U.S. v. Pridgeon, 153 U.S. 48, 62, 14 S.Ct. 746, 38 L.Ed. 631 (1893); Demaurez v. Squier, 211 F.2d 960 (9th Cir. 1941); Crowe v. <u>U.S.</u>, 200 F.2d 526 (6th Cir. 1952); <u>Duggins</u> v. <u>U.S.</u>, 240

F.2d 479 (6th Cir. 1957).

In the case herein, the fifteen-year portion of the three terms and their concurrent running were the lawful portions of the initial sentences given; only the excess of ten years in each sentence was illegal.

Therefore, it is hereby ordered that the defendant's sentence be reduced to 15 years as to Count 1, consecutive to the terms imposed by the California courts and now being served; 15 years as to Count 4, concurrent with Count 1; and 15 years as to Count 6, concurrent with Counts 1 and 4.

It is so Ordered this 30 day of Locember, 1980.

H. DALE COOK

Chief Judge, U. S. District Court

United S tes District Court for United States of America vs. the NORTHERN DISTRICT of OKLAHOMA DEFENDANT CATHERINE JO ANN SANDRIDGE DOCKET NO. - 80-CR-120-BT JUDGMENT AND PROBATION, COMMITMEAT ORDER AO-245 (5/75) In the presence of the attorney for the government MONTH VEA the defendant appeared in person on this date 23 80 COUNSEL J WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel. **XX** WITH COUNSEL William R. Grimm, Court Appointed Counsel (Name of counsel) XX GUILTY, and the court being satisfied that \_\_\_\_\_ NOLO CONTENDERE, I NOT GUILTY PLEA there is a factual basis for the plea, NOT GUILTY. Defendant is discharged There being a finding and of Defendant has been convicted as charged of the offense(s) offining violated Title 18, U.S.C., Section 1799, as charged in the two count Indictment. FINDING & JUDGMENT The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that the court adjudged the defendant guilty as charged and convicted and ordered that the court adjudged the defendant guilty as charged and convicted and ordered that the court adjudged the defendant guilty as charged and convicted and ordered that the court adjudged the defendant guilty as charged and convicted and ordered that the court adjudged the defendant guilty as charged and convicted and ordered that the court adjudged the defendant guilty as charged and convicted and ordered that the court adjudged the defendant guilty as charged and convicted and ordered that the court adjudged the defendant guilty as charged and convicted and ordered that the court adjudged the defendant guilty as charged and convicted and ordered that the court adjudged the defendant guilty as charged and convicted and ordered that the court adjudged the defendant guilty as charged and convicted and co MARCH SCORE MUNICIPAL PROPERTY OF MARCHEST REPORTED FOR THE STREET OF THE SECOND SECON Counts 1 and 2 - Imposition of Sentence in Counts 1 and 2 are hereby SENTENCE suspended and defendant Catherine Jo Ann Sandridge NR is placed on probation for a period of Eighteen (18) PROBATION Months as to each count with Count 2 to run concurrent-ORDER ly with Count 1. All pursuant to Title 18, U.S.C., Section 5010(a), under the provisions of the Youth Correction Act. FILED SPECIAL CONDITIONS OF **PROBATION** ADDITIONAL In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period. CONDITIONS 0F PROBATION The court orders commitment to the custody of the Attorney General and recommends, It is ordered that the Clerk deliver Approved as to form: a certified copy of this judgment COMMITMENT and commitment to the U.S. Mar-RECOMMENshal or other qualified officer. **DATION** Philard L. Rounds, Jr. CERTIFIED AS A TRUE COPY ON Assistant U.S. Attorney DEC 23 1980 SIGNED BY U.S. District Judge Thomas R. Brett 23. 1980 Dec. Date Mo

NORTHERN District of OKLAHOMA
United States of America Criminal No. 80-CR-119-Bt  vs.  HUBERT REX SMITH
ORDER FOR DISMISSAL
Pursuant to Rule 48(a) of the Federal Rules of Criminal
Procedure and by leave of court endorsed hereon the United States
Attorney for the Northern District of Oklahoma
hereby dismisses the COUNT I of the INDICTMENT against (indictment, information, complaint)
Hubert Rex Smith defendant.
JACK C. SILVER, CLERK U. S. DISTRICT COURT  United States Attorney HUBERT H. BRYANT
Leave of court is granted for the filing of the foregoing dismissal.  United States District Judge  Date: December 23, 1980
DOJ FORM OBD-113 8-27-74

United S' es District Court for United States of America vs. the NORTHERN DISTRICT of OKLAHOMA DEFENDANT HUBERT REX SMITH 80-CR-119-BT DOCKET NO. - L JUDGMENT AND PROBATION/COMMITTEET ORDER AO 245 (5/75) In the presence of the attorney for the government MONTH the defendant appeared in person on this date 12 23 80 COUNSEL J WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel. Maynard Ungerman, Retained Counel (Name of counsel) XX GUILTY, and the court being satisfied that **\_** NOLO CONTENDERE, PLEA there is a factual basis for the plea, NOT GUILTY. Defendant is discharged There being a finding/wedge of Defendant has been convicted as charged of the offense(s) of having violated Title 26, Section 7201, as charged in Counts 2 and 3 of the Indictment. FINDING & **JUDGMENT** The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that the court adjudged the defendant guilty as charged and convicted and ordered that hards committed to the custody of the Attorney Canaral or his authorized representative for imprisonment for a period of Count 1 - Dismissed in Open Court on this date. Count 2 - Imposition of Sentence is hereby suspended and defendant SENTENCE Hubert Rex Smith is placed on probation for a period of Two (2) Years, and fined \$2,500.00. 0R **PROBATION** ORDER Count 3 - Imposition of Sentence is hereby suspended and defendant Hubert Rex Smith is placed on probation for a period of Count 3 is to run Two (2) Years and fined \$2,500.00. concurrent with Count 2, making a total sentence of Two (2) Years Probation and a total fine of \$5,000.00. SPECIAL CONDITIONS OF **PROBATION** IT IS FURTHER ORDERED BY THE COURT that defendant Hubert Rex Smith is to make restitution in the amount of \$4,456.00. ADDITIONAL In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke CONDITIONS 0F **PROBATION** probation for a violation occurring during the probation period. The court orders commitment to the custody of the Attorney General and recommends, It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Mar-COMMITMENT shal or other qualified officer. RECOMMEN-DATION Philard L. Rounds, Jr. CERTIFIED AS A TRUE COPY ON Assistant U.S. Attorne DEC 23 1980 THIS DATE U.S. District Judge Thomas Brett ERK Dec. 23, 1980. DEPUTY 

United S tes District Court for United States of America vs. the NORTHERN DISTRICT of OKLAHOMA **DEFENDANT** VICTORIA VELON BUTLER 80-CR-118-01-BT DOCKET NO. ---JUDGMENT AND PROBATION/COMMITMENT ORDER AO - 245 (5/75) In the presence of the attorney for the government MONTH the defendant appeared in person on this date 23 80 12 COUNSEL J WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel. WITH COUNSEL \_\_O. B. Graham, Appointed Counsel (Name of counsel) I NOT GUILTY GUILTY, and the court being satisfied that **\_** NOLO CONTENDERE, **PLEA** there is a factual basis for the plea, DEG 23 De NOT GUILTY. Defendant is discharged There being a finding/seedist of LXX GUILTY. Defendant has been convicted as charged of the offense(s) of having violated Title 18, U.S.C., FINDING & Section 656, as charged in the one count Indictment. JUDGMENT The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is berahu committed to the custody of the Attorney Coperal or his authorized representative for imprisonment for a period of Count 1 - Imposition of Sentence is Suspended and defendant Victoria Velon Butler is hereby placed on probation SENTENCE for a period of Eighteen (18) Months, pursuant to OR Title 18, U.S.C., Section 5010(a), under the provisions **PROBATION** of the Youth Correction Act. ORDER SPECIAL CONDITIONS 0F IT IS FURTHER ORDERED BY THE COURT that defendant Victoria Velon **PROBATION** Butler make restitution in the amount of \$1,000.00, to be made in monthly payments determined by the United States Probation Office for the Northern District of Oklahoma, Tulsa, Oklahoma. **ADDITIONAL** In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period. CONDITIONS 0F **PROBATION** The court orders commitment to the custody of the Attorney General and recommends, It is ordered that the Clerk deliver Approved as to form: a certified copy of this judgment COMMITMENT and commitment to the U.S. Marshal or other qualified officer. RECOMMEN-DATION Philard L. Rounds, Jr. CERTIFIED AS A TRUE COPY ON Assistant U.S. Attorney DEC 23 1980 THIS DATE LX U.S. District Judge Thomas R. Brett Dec--23, 1980 XXXXXXXXX ho

United States	of America vs.	United S	tes	Distr	ict Co	urt f
DEFENDANT		the NORT	CHERN C	ISTRICT	of OKL	AHOMA_
	PLOYD DWAYNE MARKHAM	DOCKET N	o. <b>→</b> 80	-CR-117	-BT	
	JUDGMENT AND PROBE	TON/COMMI	TMEN	T ORD	ER AO	245 (5/75)
	In the presence of the attorney for the governmenthe defendant appeared in person on this date —	nt		12	DAY 23	YEAR 80
COUNSEL	have counsel appoir	rt advised defendant of right in inted by the court and the defend oth Retained Co (Name of	dant thereup	and asked whe	ther defendan ance of counse	t desired te
PLEA	GUILTY, and the court being satisfied that there is a factual basis for the plea,	NOLO CONTE	NDERE,	NO	T GUILTY	
	There being a finding WARRE of XX GUIL					
FINDING & JUDGMENT	Defendant has been convicted as charged of the of Section 922(h), Title 18, U.S.C., Section 922(a)(6), as	5.C., App. 1202( 5.C., app. 1202( 5 charged in the	olated a)(1), two c	Title l and Tit ount Ind	S, U.S. le 18, ictment	c.,
	The court asked whether defendant had anything to say was shown, or appeared to the court, the court adjudge hereby committed to the custody of the Attorney Genera	ed the defendant guilty as charg	ged and conv	icted and order	ed that: The o	the contrary defendant is
SENTENCE OR PROBATION ORDER	Count 1 - Two (2) Years Impridefendant Floyd Dwayne Markhatreatment type institution for execution of the remainder of and the defendant is placed (21) Months, to commence when confinement.	isonment, on the am be confined in or a period of TI the sentence is on probation for	condit n a jai hree (i s herel a peri	tions th il type 3) Month by suspected of T	at or s, the nded wenty-o	ne
SPECIAL CONDITIONS OF	Count 2 - Imposition of Sente Ployd Dwayne Markham is place Years, to commence at the time One.	ed on probation f	for a r	period o	f Two (	2)
PROBATION	IT IS FURTHER ORDERED BY THE defendant Floyd Dwayne Markha Marshal's Office, Tulsa, Okla	m is to report t	to the	United	States	.м.
ADDITIONAL CONDITIONS OF PROBATION	In addition to the special conditions of probation imposs reverse side of this judgment be imposed. The Court may any time during the probation period or within a maxim probation for a violation occurring during the probation p	change the conditions of probat	tion reduce.	or extend the n	aried of probat	tion and at
COMMITMENT RECOMMEN-	The court orders commitment to the custody of the Approved as to form:	e Attorney General and reco	mmends,	a certified and commit	I that the Clerk copy of this ju ment to the U r qualified offic	dgment .S. Mar-
DATION	Philard L. Rounds, Jr. Assistant U.S. Attorney			CERTIFIED A  THIS DATE	EC 23 198	
SIGNED BY		The second secon	·1	Ву	<u>.                                    </u>	S.W
EKKKUY	Thomas R. Brett	Date Dec. 23, 19	80.	<del></del>		LERK
t 1999 try subsubsubsition and any	d	e material de la companya de la comp	ho			

UNITED STRIES DISTRICT COURT
NORTHERN District of OKLAHOMA
United States of America Criminal No. 80-CR-103-Bt  vs.  DAVID TURNER
ORDER FOR DISMISSAL
Pursuant to Rule 48(a) of the Federal Rules of Criminal
Procedure and by leave of court endorsed hereon the United States
Attorney for the Northern District of Oklahoma
hereby dismisses  COUNT I of the INDICTMENT  (indictment, information, complaint)  against
David Turner defendant.
IN OPEN COURT  LEG 2 3 1980 \ JACK C. SILVER, CLERK U. S. DISTRICT COURT
Asst. Onited States Attorney
Leave of court is granted for the filing of the foregoing dismissal.  United States District Judge
Date: December 23, 1980.
DOJ FORM OBD-113 8-27-74

United S tes District Court for United States of America vs. the NORTHERN DISTRICT of OKLABOMA DEFENDANT DOCKET NO. - 80-CR-103-02-BT DAVID TURNER JUDGMENT AND PROBATION/COMMITMENT ORDER AO 245 (5/75) In the presence of the attorney for the government the defendant appeared in person on this date -COUNSEL J WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon walved axistance of counsel. L Donald M. Bingham, Retained Co (Name of counsel) LXX) WITH COUNSEL Counsel . LXX GUILTY, and the court being satisfied that L\_\_\_\_ NOLO CONTENDERE, J NØT, GUILTY PLEA there is a factual basis for the plea, → NOT GUILTY. Defendant is discharged There being a finding/wedletcof Defendant has been convicted as charged of the offense(s) of having violated Title 21, U.S.C., Section 846 and 841(a)(1), as charged in Count 2 of the Indictment. FINDING & JUDGMENT The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that:-The-defendant is Count 2 - Imposition of Sentence is hereby suspended and defendant David Turner is placed on probation for a period of Four SENTENCE (4) Years, pursuant to Title 18, U.S.C., Section 5010(a), 0R under the provisions of the Youth Correction Act. **PROBATION** ORDER Count 1 - Order of Dismissal filed in Open Court. AS A CONDITION OF PROBATION: IT IS FURTHER ORDERED BY THE COURT that defendant David Turner shall **SPECIAL** CONDITIONS ΩF reside in and participate in the program of the Salvation Army **PROBATION** Community Prerelease Treatment Center for a period of Ninety (90) Days commencing January 20, 1981, at 2:00 P.M. ADDITIONAL In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the CONDITIONS reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period. 0F **PROBATION** The court orders commitment to the custody of the Attorney General and recommends, It is ordered that the Clerk deliver Approved as to form: a certified copy of this judgment and commitment to the U.S. Mar-COMMITMENT shal or other qualified officer. RECOMMEN-DATION Philard L. Rounds, Jr. CERTIFIED AS A TRUE COPY ON Assistant U.S. Attorney DEC 23 1980 SIGNED BY Y U.S. District Judge Thomas R. Brett 23, 1980 J XXXXXXXXXXX W

United S tes District Court for United States of America vs. the NORTHERN DISTRICT of CRLAHOMA **DEFENDANT** JAMES LEON CUENCA DOCKET NO. - 80-CR-103-01-BT JUDGMENT AND PROBATION/ COMMENT OF ORDER AO-245 (5/75) In the presence of the attorney for the government MONTH the defendant appeared in person on this date -12 23 80 COUNSEL → WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel. XX WITH COUNSEL John Street, Retained Counsel (Name of counsel) LXXI GUILTY, and the court being satisfied that NOLO CONTENDERE, PLFA there is a factual basis for the plea, NOT GUILTY. Defendant is discharged There being a finding/rendict o Defendant has been convicted as charged of the offense(s) of having violated Title 21 Section 841(a)(1) and Title 21, U.S.C., Sections 846 and 841(a)(1), FINDING & as charged in the two count Indictment. JUDGMENT The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Count 1 - Imposition of Sentence is hereby suspended and defendant SENTENCE James Leon Cuenca is placed on probation for a period of 0R Three (3) Years. **PROBATION** ORDER Count 2 - Imposition of Sentence is hereby suspended and defendant James Leon Cuenca is placed on probation for a period of Three (3) Years. Count 2 is to run concurrent to Count 1, and Counts 1 and 2 are pursuant to Title 18, U.S.C., Section 5010(a), under the provisions of the Youth Correction Act. SPECIAL AS A CONDITION OF PROBATION: IT IS FURTHER ORDERED BY THE COURT that defandant James Leon Cuenca CONDITIONS 0F shall reside in and participate in the program of the Salvation Army Community Prerelease Treatment Center for a period of Sixty (60) Days **PROBATION** commencing January 5, 1981, at 2:00 P.M. **ADDITIONAL** In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period. CONDITIONS 0F **PROBATION** The court orders commitment to the custody of the Attorney General and recommends, It is ordered that the Clerk deliver Approved as to form: a certified copy of this judgment and commitment to the U.S. Mar-COMMITMENT shal or other qualified officer. RECOMMEN-Philard L. Rounds, Jr. DATION CERTIFIED AS A TRUE COPY ON Assistant U.S. Attorney U.S. District Judge **ERK** Thomas R. Brett 23. 1980. DEPUTY 

#### F. I L' E D IN OPEN COURT,

#### UNITED STATES DISTRICT COURT

Northern	District of	Oklahoma	DEC 2 3 1980 4)
			JACK C. SILVER, CLERK U. S. DISTRICT COURT
United States of America	}	Criminal No.	80-CR-101-BT
vs.	<b>\</b>		
RAYMOND D. TAH	Ś		

#### ORDER FOR DISMISSAL

Pursuant to Rule 48(a) of the Federal Rules of Criminal

Procedure and by leave of court endorsed hereon the United States

Attorney for the Norther District of Oklahoma

hereby dismisses the Indictment only against (indictment, information, complaint)

Raymond D. Tah defendant.

Asst. United States Attorney

Leave of court is granted for the filing of the foregoing dismissal.

United States District Judge

Date: DECEMBER 23, 1980

, DOJ

FORM OBD-113

8-27-74

United States o	)					ימרונו הא	PER DR	DISTRICT	ict Co	CAUCHEA
DEFENDANT	RAYMON	D	ТАН			DOCKET NO		80-CR-1		
,	JUDG	MENT	AND	PROBATI	ION/CO	TA TA ET	MEN	了 ORD	ER AO	· 245 (5/75)
			ttorney for th in person on	ne government this date		THE ST. S.	<b>—</b>	MONTH 12	DAY <b>23</b>	YEAR
COUNSEL	WITH XX WITH		have	ever the court ad counsel appointed t Martin.	by the court an	d the defenda	int thereupo	nd asked whe	ther defendan	t desired t
PLEA	KX GUILT	Y, and the s a factual l	court being s pasis for the p	satisfied that lea,	L NOL	O CONTEN	IDERE,	NO	T GUILTY	
FINDING & JUDGMENT	Defendant h	as been con	victed as char	NOT GUILTY.  rged of the offens  arged in t	se(s) of <b>hav</b>	ing vic	lated		18, U.S.	.c.,
	The court ack	ad whathar a	lafandant had a	anuthing to easy wha	u judament che	محمدها فمسامل	marinand D	annua ma suffi		<b>.</b>
SENTENCE OR PROBATION ORDER	was shown, or	appeared to the second	o the court, the	of Sentence Tah is planeths.	ne defendant gu Example (A) Ce is he aced on	ilty as charge	d and conv CEMENTS ISPENDA ION FO	icted and orde KRANISA \$3 ed and c r a peri	red that: <b>XXX</b> RESEST defendar iod of	CHENGEN BE
OR PROBATION ORDER  SPECIAL	was shown, or	appeared to the second	o the court, the	e court adjudged the market seek and the court adjudged the court and th	ne defendant gu Example (A) Ce is he aced on	ilty as charge	d and converse aspenda	ed and c	defendar	
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OR PROBATION ORDER  SPECIAL CONDITIONS OF PROBATION  ADDITIONAL CONDITIONS OF PROBATION	In addition to reverse side of any time durin probation for a The court ore	the special of this judgment violation of the probation o	conditions of protection period or vicurring during temperature to the form:	of Sentence Tah is pla 8) Months.  The Court may chawithin a maximum the probation period custody of the A	bove, it is hereinge the condition period.	reby suprobation of five year	at the generion, reduce	ed and conditions of extend the performance of the law, may	defendar iod of	t out on the ation, and at and revoked
OR PROBATION ORDER  SPECIAL CONDITIONS OF PROBATION  ADDITIONAL CONDITIONS OF PROBATION	In addition to reverse side of any time durin probation for a The court ore Approved.	the special chis judgme g the probat violation ochers commit	conditions of print be imposed. tion period or vicurring during temperature to the	of Sentence Tah is pla 8) Months.  The Court may cha within a maximum the probation period custody of the A	bove, it is hereinge the condition period.	reby suprobation of five year	at the generion, reduce	ed and corrected the period by law, may	defendar iod of	t out on the ation, and at and revoked when the tand revoked the tand revo
OR PROBATION ORDER  SPECIAL CONDITIONS OF PROBATION  ADDITIONAL CONDITIONS OF PROBATION  COMMITMENT RECOMMEN	In addition to reverse side of any time durin probation for a Philard Assistant	the special of this judgment will as to	conditions of protection period or vicuring during tent to the form;	of Sentence Tah is pla 8) Months.  The Court may cha within a maximum the probation period custody of the A	bove, it is hereinge the condition period.	reby suprobation of five year	at the generion, reduce	ed and corrected the period by law, may	defendar iod of	t out on the ation, and at and revoke the deliver udgment J.S. Maricer.

United States of	America vs.	United S* es	District Court fo
}	BOBBY RAY GOLDEN	NORTHERN DIS	STRICT OF OKLAHOMA
DEFENDANT		DOCKET NO 🛌 1 8	0-CR-62-01-C
		•	
	JUDGMENT AND P	PROBATION/COMMITMEN	T ORDER AO-245 [5/75]
	In the presence of the attorney for the the defendant appeared in person on t		MONTH DAY YEAR 12-19-80
COUNSEL	have o	ver the court advised defendant of right to counsel counsel appointed by the court and the defendant thereup	on waived assistance of counsel.
	WITH COUNSELI	ARRY A. GULLEKSON, COURT app (Name of counsel)	ointed
PLEA	GUILTY, and the court being sa there is a factual basis for the ple		X NOT GUILTY
$\overline{}$	There being a finding/verdict of	NOT GUILTY. Defendant is discharged  GUILTY.	
	Defendant has been convicted as charge	ged of the offense(s) of having violate	a Trid 16, E D
FINDING &	U.S.C., Section 242		
JUDGMENT			DE0 1 9 198)
			Marin California (California)
J			15% O. Silver, Co. 1
	hereby committed to the custody of the At ONE (1	court adjudged the defendant guilty as charged and controlled General or his authorized representative for imprise.  2) YEAR, on the condition that is all type or treatment insti	conment for a period of t defendant
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OR PROBATION ORDER  SPECIAL CONDITIONS OF PROBATION  CONDITIONS OF PROBATION  COMMITMENT RECOMMENDATION	ONE (1 is imprisoned in a period of Sixty (60) of the sentence is on probation for a to commence at the herein.  In add defendant is prohib enforcement officer type of work which sort of law, regular probation.  IT IS sentence is stayed In addition to the special conditions of preverse side of this judgment be imposed, any time during the probation period or we probation for a violation occurring during the type of the court orders commitment to the court orders commitment to the court orders commitment to the court orders.	lition to the usual terms of superiod of Five (5) Years; sa expiration of the jail sente of the jail s	probation, a law other of any eriod of probation, and at ted by law, may issue a warrant and revoke a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.  CERTIFIED AS A TR COPY ON THIS DATE

United S tes District Court for les of America vs. the NORTHERN DISTRICT of OKLAHOMA DEFENDANT RONALD LARRY MILLER 80-CR-99-BT DOCKET NO. JUDGMENT AND PROBATION/COMMITMENT ORDER AO 245 (5/75) In the presence of the attorney for the government the defendant appeared in person on this date 12 18 80 COUNSEL J WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel. LXXI WITH COUNSEL ∟ Wesley E. Johnson, Appointed Counsel (Name of counsel) LXXI GUILTY, and the court being satisfied that → NOLO CONTENDERE, NOT GUILTY PLEA there is a factual basis for the plea, NOT GUILTY. Defendant is discharged There being a finding/yesdict of XX GUILTY. Defendant has been convicted as charged of the offense(s) of having violated Title 18, U.S.C., FINDING & Section 1951, as charged in the one count Indictment. **JUDGMENT** The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Count 1 - Fifteen (15) Years Imprisonment. SENTENCE ΛR **PROBATION** ORDER SPECIAL IT IS FURTHER ORDERED BY THE COURT that this period of imprisonment CONDITIONS shall run consecutive to any period of imprisonment defendant is now serving, and this period of imprisonment shall also run consecutive 0F **PROBATION** to any period of imprisonment imposed from any Probation Revocation, where the probation period had heretofore been entered. **ADDITIONAL** In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period. CONDITIONS 0F **PROBATION** The court orders commitment to the custody of the Attorney General and recommends, It is ordered that the Clerk deliver Approved as to form: a certified copy of this judgment and commitment to the U.S. Mar-COMMITMENT shal or other qualified officer. RECOMMEN-Philard L. **DATION** Rounds, CERTIFIED AS A TRUE COP Assistant U.S. Attorney THIS DATE C 18 SIGNED BY U.S. District Judge Thomas 

CALIED BIRIES DISTRICT COOK!	
NORTHERN District of OKLAHOMA	
United States of America ) Criminal No. 80-CR	-125-1-Bt
vs. }	
CHUCK AUGUSTUS KAYS	
$i\mathcal{M}$	1 1 1
ORDER FOR DISMISSAL	
Pursuant to Rule 48(a) of the Federal Rules of Criminal	
Procedure and by leave of court endorsed hereon the United Stat	ies
Attorney for the Northern District of Oklahoma	<del></del>
hereby dismisses the INDICTMENT (indictment, MYSYMSTECH)	against
CEUCK AUGUSTUS KAYS defendant, upon the Court	
the plea of guilty in the superceding Information f date, alleging the commission of voluntary manslaugh violation of Title 18, United States Code, Sections 1151 and 1152.	hter in
•	
United States Attorned	ment
Leave of court is granted for the filing of the foregoing dismi	issal.
Date: December 14, 1980.	Brett et Judge
EODY ORD 110	1
DOJ FORM OBD-113	
8-27-74	

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Northern District of Oklahoma
United States of America ) Criminal No. 80-CR-83
Criminal No. 50-CR-65
vs.
CLAY BERNARD SYSTEMS }
INTERNATIONAL )
<b>DEO:</b> 8 <b>1980</b> <sub>//</sub> /
ORDER FOR DISMISSAL Jack C. Silver, Clerk
Pursuant to Rule 48(a) of the Federal Rules of Criminal U. S. DISTRICT COURT
Procedure and by leave of court endorsed hereon the United States
Attorney for the Northern District of Oklahoma
hereby dismisses xthe Counts 1 through 6 of the Indictmentagainst (indictment, information, complaint)
(Indicament, information, comptaint)
Clay Bernard Systems, International, only, defendant.
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" " " " " " " " " " " " " " " " " " " "
Kerney I snow
Asst. United States Attorney
Leave of court is granted for the filing of the foregoing dismissal.
3/1 /a la lavert
United States District Judge
· · · · · · · · · · · · · · · · · · ·
Date:
DOJ FORM OBD-113
8-27-74
0 27 77

Northern District of Oklahoma
United States of America Criminal No. 80-CR-83  vs.  CLAY BERNARD II
ORDER FOR DISMISSAL
Pursuant to Rule 48(a) of the Federal Rules of Criminal Jack C. Silver, Cla
V. S. DISTRICT COURT Procedure and by leave of court endorsed hereon the United States
Attorney for the Northern District of Oklahoma
hereby dismisses the entire Indictment against Clay Bernard II only (indictment, information, complaint)
defendant.
Line A States Attorney
Leave of court is granted for the filing of the foregoing dismissal.
United States District Judge Date:
FORM OBD-113
DOJ 9-27-7/

h :

# IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
vs.	)	No. 76-CR-118-B
ROY EDWARD CARTER,	)	80-C-536-C
Defendant.	)	FILED
		DEC 8 1980
	ORDER	Jack C. Silver, Chair
	<del></del> -	U. S. DISTRICT COURT

Now before the Court for its consideration are Roy Edward Carter's motion pursuant to Title 28 U.S.C. 2255 to vacate, set aside, or correct sentence by a person in federal custody, and the Government's answer thereto.

The movant was charged by indictment in Case No. 76-CR-118-B with a violation of Title 18 U.S.C. §1992, in that he did willfully attempt to disable the engine of a train operated in interstate commerce by firing a pistol at the engine of said train. Movant entered a plea of guilty to the charge and on October 13, 1976, was sentenced to eight (8) years until discharged, as provided in the Federal Youth Corrections Act, Title 18 U.S.C. §\$4216, 5010(c), and 5017(d).

The grounds raised in support of the present motion are that Judge Allen E. Barrow, the sentencing judge, had indicated at the time of sentencing that consideration would be given to a reduction in movant's sentence if certain State charges pending against the movant in connection with the incident giving rise to the federal charge were dismissed. There is a letter in the file dated January 28, 1977 indicating that the state charges referred to by Judge Barrow had been dismissed. On February 3, 1977, the movant filed a Motion for Reduction of Sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure based upon these same grounds.

On February 7, 1977, that motion was overruled, the Court finding that the sentence imposed was lenient and proper under the circumstances. As in the Rule 35 motion, the movant now asks that the Court modify his sentence from eight (8) years to six (6) years in accordance with Judge Barrow's statement at the time of sentencing.

The Government interposes no objection to the relief requested by the movant. There is therefore no need for an evidentiary hearing. The Court likewise finds merit in the present motion and that the movant's sentence should therefore be corrected to the six (6) year Federal Youth Corrections Act sentence.

It is therefore ordered that the sentence previously imposed upon the movant Roy Edward Carter in 76-CR-118-B is hereby corrected to provide for his treatment and supervision until discharged under the Federal Youth Corrections Act as provided by Title 18 U.S.C. Sections 5010(b), and 5017(c).

It is so Ordered this day of December, 1980.

H. DALE COOK

Chief Judge, U. S. District Court

United S tes District Court for United States of America vs. the NORTHERN DISTRICT of OKLAHOMA **DEFENDANT** ANTHONY LEE MAYBERRY DOCKET NO. > 80-CR-108-BT ON/COMMITMENT ORDER JUDGMENT 3717 AO-245 (5/75) In the presence of the attorney for the government MONTH YEAR the defendant appeared in person on this date 12 02 RN COUNSEL J WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel. WITH COUNSEL L Howard Sell, Retained Counsel (Name of counsel) GUILTY, and the court being satisfied that \_\_\_ NOLO CONTENDERE, \_\_\_ NOT GUILTY PLEA there is a factual basis for the plea, NOT GUILTY. Defendant is discharged There being a finding/ ■ GUILTY. Defendant has been convicted as charged of the offense(s) of having violated Title 18, U.S.C., Section 2313, as charged in the Indictment. FINDING & JUDGMENT The court asked whether defendant had anything to say why judgment should not be provounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and crief in the three properties of the custody of the Attorney General or his authorized representative for imprisonment for a period of Count 1 - Three (3) Years Imprisonment. SENTENCE IT IS FURTHER ORDERED BY THE COURT that defendant Mayberry may OR become eligible for parole after serving Nine (9) Months of his **PROBATION** period of imprisonment as provided in Title 18, U.S.C., Section ORDER 4205(b)(1). SPECIAL Defendant Mayberry is to report to the U.S. Marshal's Office, CONDITIONS Tulsa, Oklahoma, on December 15, 1980, by 1:30 P.M., by be informed 0F of the institution where he is to be incarerated, and to sign PROBATION an acknowledgment that he has been informed of such designation. It is further ordered that defendant Mayberry report to the specified institution via his own transportation on January 5, 1981, by 10:00 A.M. **ADDITIONAL** In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period. CONDITIONS NF **PROBATION** The court orders commitment to the custody of the Attorney General and recommends, It is ordered that the Clerk deliver Approved as to form: a certified copy of this judgment and commitment to the U.S. Mar-COMMITMENT shal or other qualified officer. RECOMMEN-Paula S. Ogg DATION CERTIFIED AS A TRUE COPY ON Assistant U.S. Attorney

GNED BY

U.S. District Judge

**\*\*\*\*** 

Thomas R. Brett

Date Dec. 2, 1980

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DEPUTY

	f America vs. \						District of		
DEFENDANT	CLAY	BERNARD	SYSTEMS	Internati 	ONAL, LTD.		80-CR-83-	- <del></del>	<u> </u>
	JUDG	MENT	AND PR	OBATIO	N/COMMI	TMEN	T ORDE	R AO-2	45 (5/75
			rney for the gov				MONTH 12	DAY 2	YEAF 80
COUNSEL	>	by IOUT COUNSE I COUNSEL	have couns	the court advised el appointed by the		to counsel and and thereupo	nd asked wheth	er defendant oce of counsel.	desired
PLEA	CXX GUIL there	TY, and the co is a factual basi	urt being satisfic s for the plea,	ed that L	NOLO CONT	ENDERE,	NOT	GUILTY	
			•		'. Defendant is disc				
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							•	, .s. *	
	was shown, o	or appeared to th	e court, the court	t adjudged the de	gment should not be fendant guilty as cha	rged and conv	icted and ordere	d that: Therefore	e contra
SENTENCE OR PROBATION ORDER	> of \$:	IT IS OR			fendant is		as a stant		
SPECIAL ONDITIONS		,				( or <b>see</b>	The second second	D	
OF PROBATION						1	DEC, 2198		
					••	120 15. 3	DEC, 2 (62) & C. Silver, 1	Sierk Nyast	
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PROBATION  DDITIONAL ONDITIONS OF PROBATION  OMMITMENT ECOMMEN-	reverse side o any time duri probation for The court of	f this judgment b ng the probation a violation occur	e imposed. The Coperiod or within ring during the proent to the custoe	ourt may change a maximum prob obation period.	, it is hereby ordered the conditions of prot ation period of five y	that the generation, reduce years permitted	al conditions of or extend the per d by law, may iss	probation set of iod of probation set a warrant a that the Clerk opy of this judgent to the U.S. qualified office	deliver gment i. Mar- er.

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United States of	f America vs.	Uı	nited S. tes	Distric	t Court 16
DEFENDANT	CLAY BERNARD,	II - — — — — — — — — — — — — — — —	NORTHERN DIST		LAHOMA
	JUDGMENT AI	ND PROBATION	/COMMITMEN	T ORDER	AO · 245 (5/75)
	In the presence of the attorner the defendant appeared in per-		-	MONTH 12	DAY YEAR
COUNSEL	WITHOUT COUNSEL	However the court advised dhave counsel appointed by the L. K. Smith and		on waived assistance	defendant desired to
PLEA	GUILTY, and the court there is a factual basis fo		」NOLO CONTENDERE,	NOT G	JILTY
	There being a finding/vardiete	as charged of the offense(s) of	having violate	<b>d</b> Title 18	; Sections
FINDING &	371, 287 and \$,	as charged in the	Information.	DEC 2 1980	
			, ,		ing granting
SENTENCE OR PROBATION ORDER	THE IMPOSITE hereby suspended period of Five (probation imposes the probation imposes th	ION OF SENTENCE is and the Defendants) Years from this d in Counts Two as posed in Count One ER ORDERED that the unts One, Two and	n Counts One, Tw t is placed on p s date, as to ea nd Three to run s.	o and Thre robation f ch count; concurrent	e is or a said with
SPECIAL CONDITIONS OF PROBATION	until the fine is	ER ORDERED that the experience of the experience	kecution of comm		
ADDITIONAL CONDITIONS OF PROBATION	In addition to the special condition reverse side of this judgment be in any time during the probation per probation for a violation occurring	mposed. The Court may change the riod or within a maximum probati	conditions of probation, reduce	or extend the period	d of probation, and at
COMMITMENT RECOMMEN-: DATION	The court orders commitment	to the custody of the Attorne	General and recommends,	a certified copy and commitmen shall or other qu	
SIGNED BY	•	alelook		THIS DATE 12	_
U.S. Magist	H. DALE COO	Date	December 2, 198	ho	( ) CLERK ( ) DEPUTY

Now the Contract

## IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)
Plaintiff,	) )
vs.	) No. 73-CR-103
ROBERT EUGENE COTNER,	) 80-C-384-C
Defendant.	FILED

ORDER

DEC 1 1989 M

Now before the Court is the motion of petitioner Representation Count

E. Cotner, pro se, to vacate his sentence imposed under 28

U.S.C. §2255 in Case No. 73-CR-103 in the Northern District

of Oklahoma on January 22, 1974. The sentence imposed on
petitioner consisted of one year each on two counts of mail
fraud, to run concurrently. Petitioner admits that he
entered a plea of nolo contendere in 73-CR-103 and further
alleges that U. S. District Judge Allen Barrow agreed, in
open court, to accept a nolo contendere plea, with the
understanding that he would sentence the petitioner herein
to a one-year suspended sentence, but would expunge it one
year after defendant located the main witness needed for
defense and filed a motion to withdraw his nolo contendere
plea.

Petitioner states four grounds on which relief should be granted. First, he claims that he was denied effective assistance of counsel, and was refused a hearing on his request to withdraw his plea and/or to appeal. Secondly, he alleges that his conviction was obtained by the unlawful failure of the prosecution to disclose evidence favorable to the defendant, that the indictment was brought in the wrong judicial district, and that the prosecution knew of both errors and failed to disclose them. Thirdly, petitioner

alleges "newly discovered" evidence, apparently consisting of alleged perjury by a witness and a recently-discovered defense witness. Fourthly, petitioner alleges that the indictment and conviction was obtained by evidence obtained pursuant to an illegal lineup or identification procedure, and an illegal search and seizure.

The Court has examined the record and concludes that the motion is frivolous and wholly without merit. record reflects that on September 5, 1973 an indictment was filed in U. S. District Court for the Northern District of Oklahoma. On November 15, 1973, the defendant appeared in Court, represented by Elmore A. Page, retained counsel, was arraigned and entered a plea of Not Guilty as to Counts 1 and 2. On December 12, 1973 the case was set for jury trial. On January 17, 1974 petitioner appeared in Court, represented by counsel, for the purpose of changing his plea of Not Guilty to Nolo Contendere over the government's objection. The record also shows that the Court found a factual basis for the plea. On January 22, 1974 sentence was entered, and on February 4, 1974 defendant began serving his sentence. On July 25, 1974, the case was called for hearing on defendant's motion that time spent under release on bond be deducted from his sentence. Defendant was represented by counsel. The motion was denied and defendant appealed. On February 14, 1975 the Mandate of the Tenth Circuit Court of Appeals issued, dismissing the appeal for mootness inasmuch as appellant had already served the sentence on which he sought bond time credit.

It is well-established that for all practical purposes the plea of nolo contendere is treated the same as a plea of guilty. Fisher v. Schilder, 131 F.2d 522 (10th Cir. 1942);

U.S. v. Feltman, 451 F.2d 153 (10th Cir. 1971); Clark v.

Western District of Oklahoma, 399 F.Supp. 305, 307 (N.D.Okla. 1975). Such a plea waives all non-jurisdictional defects in

the proceedings against the accused. Clark v. Western District of Oklahoma, supra; United States v. Grayson, 416 F.2d 1073 (5th Cir. 1969), cert. denied, 396 U.S. 1059, 90 S.Ct. 754, 24 L.Ed.2d 753, reh. denied, 399 U.S. 917, 90 S.Ct. 1114, 25 L.Ed.2d 415. As the court in Clark stated, "a plea of guilty [nolo contendere] voluntarily made forecloses an accused's right to object to the manner in which he was arrested or how the evidence may have been obtained against him. The plea is a waiver of all non-jurisdictional defenses and a sentence which would follow such a plea of guilty [nolo contendere] is a result of the plea and not the evidence theretofore obtained." Mahler v. United States, 333 F.2d 472, 474 (10th Cir. 1964), cert. denied 379 U.S. 993, 85 S.Ct. 709, 13 L.Ed.2d 613: <u>United States</u> v. <u>Doyle</u>, 348 F.2d 715 (2nd Cir. 1965), cert. denied 382 U.S. 843, 86 S.Ct. 89, 15 L.Ed.2d 84; Bailey v. United States, 324 F.2d 632 (10th Cir. 1963); Atkins v. State of Kansas, 386 F.2d 819 (10th Cir. 1967).

Finally, there is simply no truth in petitioner's assertion that he was denied effective assistance of counsel. As indicated by the record, petitioner was adequately represented by counsel at his arraignment, change of plea hearing, and at the hearing on his motion for bond time. The appeal of the denial of this motion was filed by the petitioner prose. Thus the record does not support petitioner's claim, nor does he offer additional facts in support of his claim. The burden on the petitioner to establish a claim of ineffective assistance of counsel is great. Ellis v. Oklahoma, 430 F.2d 1352 (10th Cir. 1970). The standard for competency of counsel at the time petitioner's plea was entered was that stated in Basker v. Crouse, 426 F.2d 531, (10th Cir. 1970); Frand v. U.S., 301 F.2d 102 (10th Cir. 1962): Unless the Court can say that the incompetency of the attorney was such

as to amount to making the proceedings a mockery, sham, or farce, collateral relief must be denied. The current standard in the Tenth Circuit, as stated in <a href="Dyer v. Crisp">Dyer v. Crisp</a>, 613 F.2d 275 (10th Cir. 1980), reh. denied Feb. 20, 1980, cert. denied, 100 S.Ct. 1342, requires that representation not fall below that expected of a reasonable, competent, and skillful defense attorney. A review of the record shows that under either standard, there is no evidence of a breach of duty by petitioner's counsel or that his advice was not within the range of competence required of him. Further, there is no evidence in the record, nor has the petitioner alleged any facts in support of his contentions as to denial of effective assistance of counsel or as to refusal of a hearing on a request to withdraw his plea and/or to appeal.

The petitioner's application together with the files and records of petitioner's criminal case conclusively show that there are no material issues of fact and that petitioner is not entitled to relief. It is well-established that when a motion is made to vacate a sentence, the movant must set forth facts and not merely conclusions. (Sobell v. U.S., D.C.N.Y. 1967, 264 F.Supp. 579, affirmed 378 F.2d 674, cert. denied 88 S.Ct. 780, 389 U.S. 1051, 19 L.Ed.2d 842, rehearing denied 88 S.Ct. 1025, 390 U.S. 977, 19 L.Ed.2d 1197).

In addition, as to petitioner's allegations that his retained attorney failed to take an appeal, it is a clear requirement that petitioner indicate plain error in the original trial proceedings as a condition to granting a motion for vacation of sentence. Fennell v. United States, 339 F.2d 920 (10th Cir. 1965), cert. denied 382 U.S. 852, 86 S.Ct. 100, 15 L.Ed.2d 90 (1965). No evidence has been advanced by petitioner nor does the record show plain error in the original proceedings.

For all these reasons, petitioner's motion to vacate

sentence is hereby overruled.

It is so Ordered this \_\_\_\_\_day of November, 1980.

H. DALE COOK Chief Judge, U. S. District Court